

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

MEHLVILLE FIRE PROTECTION DISTRICT)	
)	
Petitioner,)	
)	
v.)	
)	Public Case No. UC 2010-022
INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, LOCAL 1889)	
)	
Respondent.)	

DECISION

In this case, the Mehlville Fire Protection District petitions to amend a previously Board-certified bargaining unit to exclude Captains. The Captains were included in the certified bargaining unit when it was first certified in 1969 and they remained in the unit when it was recertified in 1991. Although the geographic area covered by the District has undergone demographic changes over the past few decades and the nature of the work has also grown to include a significant emergency medical response component, the Board concludes that the duties of the District's Captains have not changed to a sufficient degree to merit removing them from the bargaining unit.

INTRODUCTION

On April 5, 2010, the Mehlville Fire Protection District (District) filed a unit clarification petition seeking to exclude the District's position of Captain from the certified bargaining unit. The Board-recognized exclusive bargaining representative for the unit, the International Association of Fire Fighters, Local 1889 (Local 1889), opposes the District's petition. In support of its petition, the District contends that, when the duties of its Captains are examined in light of the factors the Board has developed to evaluate supervisory status, the individuals employed in this position are true supervisory employees that should be excluded from a bargaining unit. Local 1889 responds that, under Board precedent, a class of employees previously included in a bargaining unit will not subsequently be excluded from the unit unless the duties of that class

of employees have substantially changed. Local 1889 argues that the changes in the duties performed by the District's Captains since the bargaining unit was first certified (with the Captains being included in the unit) and then recertified (with the Captains remaining in the unit) are not substantial enough to merit excluding them from the bargaining unit.

The question of when a class of employees may be excluded from a bargaining unit after it has been specifically included in the unit is one that arises within the general subject of the appropriateness of a bargaining unit. This Board is authorized to hear and decide issues related to the appropriateness of bargaining units. § 105.525, RSMo. The Board held a hearing in St. Louis, Missouri, on June 24, 2010, to allow the parties to provide testimony and other evidence regarding the issues raised by the District's unit clarification petition. Board Chairman Jim Avery, Employer Member Emily Martin, and Employee Member Lewis Moye were present in person to hear the case. Representatives of the District and of Local 1889 attended the hearing and had a full opportunity to present evidence and make arguments. Both parties also took advantage of the opportunity they were given to file post-hearing briefs.

Based on our review of the whole record, including the evidence presented, arguments made, and briefing filed, we issue the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Mehlville Fire Protection District is the largest paid fire protection district in the state of Missouri. It serves an area of 52 square miles and includes more miles of both highways and rivers than any other Fire Protection District. The District has seven firehouses (the seventh becoming operational in the 1980s) and operates a total of thirteen to fourteen vehicles from those firehouses. The senior administrator is the Fire Chief, who reports to a Board of Directors. The Assistant Chief reports to the Fire Chief and, in turn, oversees three Deputy Chief Duty Officers. The Deputy Chief Duty Officers work one of three shifts and are in charge of operations within the whole District during their particular shifts. The District also has a

Deputy Chief for Emergency Medical Services and a Deputy Chief Training Officer. The District has 140 employees in all, twenty-four of whom are Captains.

Since its creation in 1952, the District has grown from its rural roots into a much more commercial and institutional environment. As the area has developed, the fire fighting challenges faced by the District have become more varied and complex. The days of fighting mostly wood fires are gone and District fire fighters now have to be prepared to deal with perils such as burning synthetic materials and biological hazards. The District also originally provided little or no medical service, but it now employs paramedics and operates multiple ambulances. Currently, about 75 % of the District's calls are for emergency medical services. The medical training and responsibilities of District staff continue to expand.

Captains are the senior officers assigned to the District's firehouses. They are responsible for their firehouses during their shifts and are in charge of the equipment and other property located at those firehouses. They are also in charge of two to five other officers, depending on the firehouse. Captains assign work tasks to the other officers and themselves and see that these duties are carried out. These tasks include regular maintenance and clean up of the firehouse and fire equipment, as provided in the District rule book. Captains work alongside their crews in performing these daily chores.

A Captain responds to every call and upon arrival at the scene takes overall charge of the situation. If another Captain and crew arrive at the scene, the first Captain has command of both crews if the situation is stable. If the situation is not stable, the second Captain assumes overall command. If a Deputy Chief Duty Officer also responds to the call, that officer generally takes over command of the scene from the Captain. Deputy Chief Duty Officers respond to almost all calls of any significance. Captains not serving in a command capacity at the scene may physically work as a member of their crews.

A Captain will never take on command of the whole District. Whenever the regularly assigned Deputy Chief Duty Officer must leave the District during a shift, another Deputy Chief

will take temporary charge. For purposes of the District's progressive disciplinary policy "Officer/Supervisor" is defined to include the Chief, Assistant Chief, Deputy Chiefs, and Fire Marshal, but not Captains.

The District's Captains have been part of the bargaining unit certified to represent District employees since the unit's inception in 1969. In 1991, upon the joint petition of the District and Local 1889, this Board amended the unit certification to add additional job classifications into the unit. During the processing of the petition to amend the certification in 1991, no one raised any questions with the Board concerning the continuation of Captains in the unit.

Within the last two years Deputy Chiefs began to spend ten to fifteen minutes at each firehouse during each 24-hour shift to see how things are going, to discuss operations with the Captain, and to conduct quick house inspections. Previously, Deputy Chiefs might have gone a month or more between visits to a firehouse.

Captains have recently begun to have morning assemblies with their crews during which they assign duties for the day. Captains assigned the same duties before, but in a less structured setting. The duties themselves are established by written rules.

Maintenance of stricter discipline has been emphasized more in the last two years. Rather than handle matters more informally as they had been, Captains are instructed to verbally counsel subordinates that fail to comply with the regulations and to document that counseling in the subordinate's file. While Captains may recommend more severe forms of discipline such as written reprimands, suspensions, and dismissals, they have had, and continue to have, little actual say in those matters. Whether or not to impose these more severe types of discipline is up to more senior officers.

Captains used to have the authority to use their own discretion to call a mechanic when they thought a fire vehicle needed repair. Now Captains must get permission from a Deputy Chief to do so. Captains used to decide on their own when to make calls outside the firehouse

for such things as calling in maintenance staff, arranging for the delivery of standard supplies, or asking for a trash pickup. Now they need the approval of a Deputy Chief for these outside calls. Captains also now need approval from a Deputy Chief to send a truck out for refueling. Captains can no longer authorize an off-duty firefighter to spend the night in the fire house, but must check with the Deputy Chief.

Five of the District's Captains are also paramedics. District policy has changed in the last two years to mandate that these Captains work as paramedics one-sixth of the time. During shifts that a Captain is working as a paramedic, command of the firehouse crew (including the Captain serving as a paramedic) is exercised by another crew member, designated as Acting Captain, both at the firehouse and at emergency scenes. When Captains are serving as paramedics, they are also subordinate to the lead medic on the ambulance crew.

Based on the testimony and record as a whole, the Board finds that the duties of the Captains of the Mehlville Fire Protection District have undergone very little change. The minor changes that have occurred have not resulted in an alteration in the basic nature of their job.

CONCLUSIONS OF LAW

The Board has recently confirmed that it will not exclude a position (or, stated another way, a class of employees) from a unit previously found appropriate "unless the petitioner first establishes that the duties of those employees in the class have undergone substantial change. A substantial change in the duties of a class of employees is one which alters the basic nature of their job." *Washington Area Ambulance Dist. v. Professional Fire Fighters of Eastern Missouri, IAFF, Local 2665*, Case No. UC 2009-039, at 8 (SBM 2010) (quoting *Dept. of Corrections and Human Resources v. Missouri State Council 72, AFSCME*, Case No. UC 89-003, at 12 (SBM 1989) (footnote omitted)). Requiring proof of a substantial change in duties of a position before it will be removed from a unit in which it has previously been included is intended to promote stability in the meet and confer process established by Missouri's Public Sector Labor Law, §§ 105.500 to 105.530, RSMo, and to reduce turmoil in employer/employee

relations. *Washington Area Ambulance Dist.*, Case No. UC 2009-039, at 8; *Missouri State Council 72*, Case No. UC 89-003, at 11. The “substantial change” standard is well-suited to promote these goals to the benefit of both public employers and public employees. *Washington Area Ambulance Dist.*, Case No. UC 2009-039, at 8; *Missouri State Council 72*, Case No. UC 89-003, at 11.

The District contends that Captains should be removed from the certified bargaining unit because, based on an analysis of the factors the Board applies in determining supervisory status, they are supervisors. The Board has consistently held that supervisors cannot be included in the same bargaining unit as the employees they supervise. *IAFF, Local 2543 v. Poplar Bluff Fire Dept.*, Case No. UC 2000-019, at 12 (SMB 2000); *MNEA, Springfield Educ. Support Personnel v. Springfield R-12 School Dist.*, Public Case No. UC 88-021 (SBM 1988); see also *Golden Valley Mem. Hosp. v. Missouri State Bd. of Mediation*, 559 S.W.2d 581, 583 (Mo. App. K.C. Dist. 1977). The factors the Board examines when determining supervisory status are:

- (1) The authority to effectively recommend the hiring, promotion, transfer, discipline, or discharge of employees;
- (2) The authority to direct and assign the work force, including a consideration of the amount of independent judgment and discretion exercised in such matters;
- (3) The number of employees supervised and the number of other persons exercising greater, similar, and lesser authority over the same employees;
- (4) The level of pay, including an evaluation of whether the person is paid for his or her skills or for his or her supervision of employees;
- (5) Whether the person is primarily supervising an activity or primarily supervising employees; and
- (6) Whether the person is a working supervisor or whether he or she spends a substantial majority of his or her time supervising employees.

Poplar Bluff Fire Dep't, Case No. UC 2000-019, at 13 & 19.¹

Regardless of how this Board might apply these factors in this case as a matter of initial impression, however, the Captains have, in fact, already been included in the bargaining unit by a previous Board certification. As noted above, the question at this stage is whether the duties of the District's Captains have undergone a substantial change that has altered the basic nature of their job.

With regard to this question, the District emphasizes not any changes in the duties of Captains but changes in the nature of the District. While the Board is convinced that the District is now significantly more developed than it was when the unit was certified in 1969, that its fire fighting challenges have become more complex, and that its mission has grown to include a substantial emergency medical service component, these changes do not necessarily signal that the supervisory role of Captains has changed.

When asked what changes have occurred with regard to the duties of Captains, the Chief did not suggest that there have been any such changes, but rather testified that: "I have identified it [inclusion of Captains in the unit] as a flaw in the organizational structure." The Chief further testified that "clearly Captains are management. There is no argument for that but there is nothing that I can do because in 1969 they put them in there." The District's post-hearing brief also urges that the duties of Captains are so supervisory in nature that they are not properly included in the bargaining unit, but does so without suggesting that these duties have changed significantly since 1969.

That the District believes the inclusion of Captains in the unit in 1969 was inappropriate and results in a "flaw" in the organization is not relevant now. The Board has already determined in its previous certification that Captains share a community of interest with the line

¹ The courts have set out seven factors for the assessment of supervisory status, but the Board's six factors are the same as the courts' seven factors. The courts have simply divided the Board's second factor into two parts. See *Central County Emergency 911 v. Int'l Ass'n of Firefighters*, 967 S.W.2d 696, 700 (Mo. App. W.D. 1998).

fire fighters, that they are not “supervisors” as that term is used in connection with the Public Sector Labor Law, and that they should be included in the bargaining unit. The Board will not disturb that decision without evidence that the Captains’ duties have undergone substantial change. As discussed above, removal of a job classification from a previously certified unit without showing a substantial change in the nature of that job will jeopardize amicable employer/employee relations in general and the stability of the bargaining process particular.

Although the District has not focused on changes in the duties of its Captains,² the Board has set out in its Findings of Fact the changes in those duties as reflected in the record and has considered whether or not those changes substantially alter the basic nature of that position.

Captains now have morning assemblies at their firehouses at which they assign duties for the day. Previous to this change, however, Captains still assigned daily duties to their crews, although in a less structured setting. The involvement of Captains in the disciplinary process is now also more structured. They have been directed to verbally counsel subordinates that fail to comply with the regulations and to document that counseling in the subordinate’s file. Previously Captains handled routine disciplinary infractions informally by addressing the matter on their own within the confines of the firehouse. Captains still do not have the authority to impose any discipline more severe than a documented verbal counseling session. This new

²The District cites three Board decisions in which it determined that the position of fire captain as implemented by particular fire departments were supervisors. Two of these decisions are not relevant to the question here because they involved initial determinations of unit propriety and not petitions to remove the captains from existing units they were already a part of. *IAFF, Local 2665 v. City of Kirkwood*, Case No. R 89-024 (SBM 1989); *Professional Fire Fighters of St. Louis County, Local 2665, v. Eureka Fire Protection Dist.*, Case No. R 89-018 (SBM 1989). The other case did come to the Board on a unit clarification petition, but involved a reorganized fire department in which existing captains, not in the unit, became shift commanders, a new position, and lieutenants, who were included in the unit, were promoted to captain. *IAFF, Local 2543 v. Poplar Bluff Fire Dep’t*, Case No. UC 2000-019 (SBM 2000). In contrast, the Captains now before the Board are included in the existing unit and the District has not significantly reorganized its management structure, including the role of captains in that structure, as did the Poplar Bluff Fire Department.

formality in the issuance of daily assignments and verbal counselings does not substantially change the authority of Captains.³

The other changes relating to the duties of Captains have decreased their authority and independence. Deputy Chiefs now come to each firehouse for ten to fifteen minutes each day to discuss matters with the Captains and to conduct quick inspections. Previously, Captains might not see a Deputy Chief at their firehouse more than once every month or so. Captains also used to have the authority to make calls outside the firehouse to call on a mechanic or maintenance staff, to arrange for delivery of supplies, or to ask for a trash pickup. Now they need to get approval of a Deputy Chief. In another change, Captains also now need the approval of a Deputy Chief to send their vehicles out for refueling and to authorize off-duty fire fighters to spend the night in the firehouse. Additionally, Captains that are paramedics now spend about one-sixth of their time actually working on a medical crew as paramedics. When a Captain is working as a paramedic, another member of the firehouse crew takes command of the firehouse even though the Captain is present in the house. Further, when serving as a paramedic, the Captain is also subordinate to the lead medic of the ambulance crew. While these changes may be appropriate to improve consistency and oversight of District operations and to insure that Captain/Paramedics maintain their emergency medical skills, they do not reflect any basic alteration in the duties of Captains. To the extent these changes reflect on the supervisory status of Captains, they demonstrate that the Captains now exercise less

³Even if this case were coming before the Board as a matter of initial determination, the duties of the District's Captains with regard to daily job assignments and issuance of verbal warnings would not be sufficient to establish the position as a supervisory one. *See Professional Fire Fighters, Local No. 2706, v. City of Marshall*, Case No. 79-036, at pp. 7-8 (SBM 1980) (although fire captains were in charge of their shifts and in charge of a crew, where they worked alongside their crews at well understood tasks, they could not be considered supervisors); *IAFF, Local 1889, v. Central County Emergency 911*, Case No. R 95-015, at 14-15 (SBM 1995) (investing a position with the authority to verbally counsel others regarding job performance and to issue written warnings is not sufficient to turn persons in that position into supervisors).

independent discretion in management and have fewer opportunities to supervise their crews. Their function is less supervisory now than it was before.⁴

The District urges that removal of its Captains from the bargaining unit is needed in order for it to meet the requirements of the National Incident Management System (NIMS). NIMS is a systematic approach devised by the United States Department of Homeland Security to coordinate emergency responses of federal, state, and local governments and the private sector to incidents of national significance. *See generally National Incident Management System* (December 2008) <http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf> (last visited December 14, 2010). NIMS recommends a ratio of supervisors to direct subordinates of between 1 to 3 and 1 to 7, with an optimum ratio being 1 to 5. *Id.* at 47, 147. The District argues that it is out of compliance with NIMS if its Captains are not considered supervisors because, if they are not, then the Deputy Chiefs are the first-line supervisors in charge of a whole shift of about 40 District employees, which is well outside the supervisory ratio provided for in NIMS.

Even assuming that NIMS actually mandates that fire departments maintain a supervisory ratio of no more than seven subordinates per supervisor,⁵ a Board conclusion here that the District's Captains are not supervisors will not result in the District being out of compliance with NIMS. The term "supervisor," as used by the Board in applying the Public Sector Labor Law, has a special meaning. Among other considerations, the Board, in

⁴At this point, the Board would normally continue on with a review of the changes in the duties of a position subject to a unit clarification petition as those changes relate to all six of the factors the Board has developed for use in determining supervisory status. *Washington Area Ambulance Dist.*, Case No. UC 2009-039, at 9. But, as the changes in the duties of the position at issue here have been so few, especially those changes intended to promote the supervisory role of the position, an analysis of all those factors would serve little purpose.

⁵This does not seem to be actually so. *See National Incident Management System*, at 47 <http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf> (last visited December 14, 2010) ("the span of control of any individual with incident management supervisory responsibility *should* range from 3 to 7 subordinates, with 5 being optimal) (emphasis added). But, as this government publication was not introduced into evidence, the Board will assume for purposes of this decision that the District is bound to comply with the NIMS ratio.

assessing who is a “supervisor,” distinguishes between supervisors that work along with their subordinates (working supervisors) and supervisors that spend a substantial majority of their time engaged in supervision of employees and also between those who primarily supervise an activity and those who primarily supervise employees. *Washington Area Ambulance Dist.*, Case No. UC 2009-039, at 9. Depending on the application of other factors that are also considered, working supervisors and individuals that primarily supervise an activity are generally not supervisors for purposes of the Public Sector Labor Law. See *id.* On the other hand, there is no indication that a working supervisor or an individual that primarily supervises an emergency activity (instead of personnel) would not be considered as a supervisor under NIMS. Thus there is no inconsistency in Captains continuing in the bargaining unit but also being considered as supervisors for purposes of NIMS.

Of course, even if there were an inconsistency, that would not require the Board to alter a conclusion it would otherwise reach. The Board is not bound to mold its decisions regarding the proper make up of bargaining units to any criteria NIMS might impose upon emergency services providers.

CONCLUSION

The duties of the District’s Captains have not substantially changed since they were originally included in the certified bargaining unit. There has been no basic alteration in the nature of the job that would merit removal of Captains from the certified bargaining unit.

ORDER

Because the duties of the Captains have not substantially changed, the Board denies the District’s petition for unit clarification. The certified unit will remain as previously defined.

Signed this 21st day of December, 2010.

STATE BOARD OF MEDIATION

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James G. Avery, Chairman

(SEAL)

A handwritten signature in black ink, appearing to read 'Emily Martin', written in a cursive style.

Emily Martin, Employer Member

A handwritten signature in black ink, appearing to read 'Lewis B. Moyer', written in a cursive style.

Lewis Moyer, Employee Member